IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 14TH DECEMBER 2007 / 23RD AGRAHAYANA 1929

WP(C).No. 32711 of 2006(T)

PETITIONER:

SYED SHEIK KOYA,
S/O.PONNIKKAM MUTHUKOYA,
KEELA BELIYAM, AMINI ISLANDS,
UNION TERRITORY OF LAKSHADWEEP.

BY ADV. SRI.BABU S. NAIR.

RESPONDENTS:

1. **THE UNION TERRITORY OF LAKSHADWEEP,**
   REP. BY THE WORKS SECRETARY,
   (THE CONTROLLER-CUM-DEVELOPMENT COMMISSIONER),
   KAVARATHY, KAVARATHY ISLANDS,
   UNION TERRITORY OF LAKSHADWEEP.

2. **THE SUPERINTENDING ENGINEER,**
   L.P.W.D., KAVARATHY,
   UNION TERRITORY OF LAKSHADWEEP.

3. **THE EXECUTIVE ENGINEER,**
   L.P.W.D., AMINDIVI DIVISION,
   AMINI ISLANDS, UNION TERRITORY OF LAKSHADWEEP.

4. **YOUNIS,**
   ASSISTANT ENGINEER,
   L.P.W.D., AMINI ISLANDS,
   UNION TERRITORY OF LAKSHADWEEP.

W.P.(C). NO.32711/2006:

5. A.ABDULLA,
ASHEMMAKADA HOUSE, AMINI ISLANDS,
UNION TERRITORY OF LAKSHADWEEP.

R1 TO R3 BY ADV. SRI.P.R.RAMACHANDRA MENON,SC,LAKSHADWEEP,
R5 BY ADV. SRI.NOUSHAD THOTTATHIL,
ADV. SMT.NOORJI NOUSHAD,
R4 BY ADV. SRI.T.C.GOVINDA SWAMY,
ADV. SRI.M.K.DAMODARAN (SR.).

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 1/11/2007, ALONG WITH W.P.(C). NO. 23067/ 2007,THE COURT ON 14/12/20067, DELIVERED THE FOLLOWING:

W.P.(C). NO.32711/2006-T:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE TENDER NOTIFICATION ISSUED BY THE R.3. DTD. 26/08/2006.

EXT.P.2: COPY OF THE CERTIFICATES ISSUED BY THE ASSISTANT ENGINEER, L.P.W.D., CHETALAT ISLANDS TO THE PETITIONER DTD. 20/11/2001.

EXT.P.3: COPY OF THE ORDER OF THE R.3. AS NO. F. NO. 48/4/1882/2006 AB4 DTD, 03/11/2006.

EXT.P.4: COPY OF THE ORDER OF THE R.3. AS NO. F. NO. 1/13/06-AB1/1914 DTD. 15/11/2006.

EXT.P.5: COPY OF THE REPRESENTATION SUBMITTED BY THE PRESIDENT OF THE BLOCK CONGRESS (I) COMMITTEE, AMINI ISLAND TO THE R.1. ON 25/11/2006.

RESPONDENT'S EXHIBITS:

EXT.R1.A: COPY OF THE APPLICATION 12/09/06 OF THE R.5. FOR TENDER FORMS.

EXT.R1.B: COPY OF THE SOLVENCY CERTIFICATE DTD. 05/04/06.

EXT.R1.C: COPY OF THE EXPERIENCE CERTIFICATE IN RESPECT OF THE EXECUTION OF WORKS BY THE R.5. DTD. 09/01/2006.

EXT.R1.D: -DO- DTD. 17/04/06.

EXT.R1.E: -DO- DTD. 25/10/06.

EXT.R1.F: -DO- DTD. 15/02/05

EXT.R1.G: -DO- DTD. 06/08/05.

EXT.R1.H: -DO- DTD. 17/05/06.

EXT.R1.I: COPY OF THE REQUEST DTD. 02/11/06 FOR REDUCING THE RATE.

EXT.R1.J: COPY OF THE LETTER DTD. 03/11/2006 AWARDING THE WORK TO THE R.5.

EXT.R1.K: COPY OF THE AWARDING LETTER DTD. 15/11/2006 ISSUED BY THE R.3 TO THE R.5. FOR THE WORK OF RE-FLOORING OF LPWD DIVISION OFFICE AT AMINI.

W.P.(C). NO.32711/2006-T:

EXT.R1.L: COPY OF THE JUDGMENT DTD. 05/10/00 OF THIS HONOURABLE COURT IN O.P. NO. 19267/2000.

EXT.R5.1: COPIES OF THE EXPERIENCE CERTIFICATES SUBMITTED BY THE R.5. BEFORE THE R.3.

EXT.R5.2: COPY OF THE SOLVENCY CERTIFICATE NO. SO1/9953/AA/06 DTD. 05/04/06 ISSUED FROM THE SYNDICATE BANK, AMINI BRANCH TO THE R.5.

EXT.R5.3: COPY OF THE EVALUATION CERTIFICATE F. NO. 13/6/2005-SDO DTD. 04/03/06 ISSUED FROM THE OFFICE OF THE SUB DIVISION OFFICER, AMINI.

EXT.R5.4: COPY OF THE ORDER NO. DGW/MAN 129, DTD. 21/12/2005 ISSUED BY THE DIRECTOR GENERAL OF WORKS, CPWD, GOVERNMENT OF INDIA, NEW DELHI.

//TRUE COPY//

prv.

ANTONY DOMINIC, J.

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W.P.(C)Nos.32711 OF 2006 & 23067 OF 2007

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Dated this the 14th day of December, 2007

J U D G M E N T

WPC No.32711/2006

This writ petition is filed praying for quashing Exts.P3 and P4 and to declare that the 5th respondent is not eligible to be issued tender forms pursuant to Ext.P1 tender notice. Petitioner also seeks a direction to respondents 1 to 3 not to make any payments to the respondent in pursuance to Exts.P3 and P4.

2. The 3rd respondent had published Ext.P1 tender notice inviting tenders from eligible contractors to execute the 13 items of work specified therein. It was provided that the tender forms will be issued only to those eligible contractors who produce documentary evidence to prove their capability for having done (1) three similar works each value 40% of the estimated cost put to tender or (2) two similar works each value 50% of the estimated cost put to tender or (3) one similar work each value 80% of the estimated cost put to tender during the last 7 years and bank solvency certificate.

3. Petitioner submits that he had executed certain works and had produced Ext.P2 certificate in proof thereof. However, when he approached 3rd respondent for obtaining tender forms, the 3rd respondent declined his request on the ground that the petitioner did not satisfy the requirements. It is stated that despite this, tender forms were issued to the 5th respondent who did not satisfy the pre-qualifications provided in Ext.P1 and that he was allotted two works. Ext.P3 is the order issued by the 3rd respondent awarding the construction work of PWD store building at Kiltan to the 5th respondent for a negotiated amount of Rs.13,78,266/-. Ext.P4 is the order issued by the 3rd respondent awarding the work of re-flooring of LPWD Division Office at Amini to the 5th respondent. Petitioner submits that Ext.P5 is a representation made by the President of the Block Congress (1) Committee against the illegality committed by the 3rd respondent in awarding the works of the 5th respondent. According to him, the 4th respondent in connivance with the 3rd respondent has awarded these works, to the 5th respondent, who is only the benami of the 4th respondent. It is

on this basis the writ petition has been filed with the aforesaid prayers.

4. Respondents 1 to 3 have filed counter affidavit in which they admit the pre-qualification norms set by them. It is stated that the petitioner had not forwarded any application for issuing tender forms to him and that they had not received any such application till the last date fixed for that purpose. According to respondents 1 to 3 based on his request dated 12.09.2006, tender form was issued to the 5th respondent and Exts.R1(a) to R1(h) are the documentary evidence that was produced by the 5th respondent in proof of his claim of having satisfied the tender conditions. It is stated that in the past also though the department had strictly adhered to the requirement of Bank Solvency Certificate, in the case of work experience, leniency has been shown. They would reiterate that work was allotted to him, as the 5th respondent had satisfied the rules of the tender. Exts.R1(j) & (k) are the orders awarding the work to the 5th respondent. They also relied on the judgment in O.P.No.19687 of 2000 to contend that disputed questions in

contractual matters cannot be decided by this Court.

5. The 5th respondent has filed a counter affidavit in which he submits that he had produced Exts.R5(1) series, the solvency certificate and other certificates. While he thus reiterates his eligibility for the award of work, he denies the averment that he is a benami of the 4th respondent. The 4th respondent has also filed counter affidavit in which he has denied the allegations that are personally leveled against him.

6. In this case, an interim order staying all further proceedings pursuant to Exts.P3 and P4 was passed on 08.12.2006 and this order was extended thereafter. After hearing parties a Learned Single Judge of this Court, in the order dated 13.02.2007, made the interim order absolute. Writ Appeal No.603 of 2007 was filed against the order dated 13.02.2007 and the writ appeal was dismissed by judgment dated 12.03.2007.

7. When the writ petition was taken up for hearing, the counsel for the writ petitioner, contended that the 5th respondent did not satisfy the tender conditions and therefore was ineligible to

be issued tender forms and consequently he could not have been awarded any of the works that were tendered in Ext.P1. On behalf of the 5th respondent, Senior Counsel contended that he satisfied the tender conditions and according to him, the petitioner was not an aggrieved person, in as much as, he had not even applied for tender forms. It is stated that Ext.P5 was submitted by the President of the Block Congress (I) Committee and from this itself it was obvious that the motive of the petitioner was political. It was also contended that there was no public interest involved and that since the 5th respondent had already completed the work awarded by Ext.P4 and made substantial progress in the work awarded by Ext.P3, if relief is granted in any manner that will be against public interest. It was further contended that there was no provision in the CPWD Works Manuel similar to what is incorporated in Ext.P1 and that the expression similar works occurring in Ext.P1, does not mean that the work executed should be identical in all respects. Reference in this connection was made the decision of the Apex Court in Nat Steel Equipment Pvt. Ltd. v. Collector of Central Excise

reported in AIR 1988 SC 631 and of this Court in Siddique v. District Collector reported in 2006 (4) KLT 21. In support of the contention that only for subserving public interest this court should interfere in a matter like this, the counsel for the 5th respondent occurred in the decision in the case of Raunaq International Ltd. v. I.V.R. Construction Ltd. And Others reported in 1999 (1) SCC 492.

8. From the contentions that are raised, the 1st question that needs to be answered is whether the 5th respondent had satisfied conditions that are incorporated in Ext.P1 for the issue of tender forms. The conditions that are incorporated for the issue of tender forms are that the tenderer should have executed 3 similar works of each value 40% of the estimated cost put to work or two similar works each value 50% or one similar work of 80% estimate cost during the last 7 years and that bank solvency certificate should be produced. Admittedly bank solvency certificate has been produced. Therefore, the dispute is as to whether the 5th respondent satisfied the requirement of execution of similar works of the value as specified in Ext.P1 during the previous 7 years.

9. Ext.P3 shows that the value of the work of construction of PWD store building is Rs.13,78,266/- and as per Ext.P4 the value of the work of reflooring of LPWD Division is Rs.3,42,307/-. The certificates that are produced by the 5th respondent are produced along with his counter affidavit as Ext.R5(1) series. These certificates are also produced by respondents 1 to 3 in their counter affidavit as Exts.R1(c) to R1(h).

10. Now I shall examine whether the certificates produced will satisfy the conditions of Ext.P1. Ext.R5(1) is dated 09.01.1996 and its certifies that the 5th respondent has carried out "various types of department works approximately worth Rs.3 lakhs". Not only that the certificate pertains to a period prior to 7 years from 26.08.2006, when Ext.P1 was issued, but also that the certificate does not provide any details about the works that were stated to have been executed by the 5th respondent. If that be so, Ext.R5(1)1 certificate is of no assistance to the 5th respondent. Ext.R5(1)2, a certificate issued by the Executive Engineer (Civil) certifies that the work of construction of Fero Cement Water Tank for Rain Water

Harvesting for an amount of Rs.19,624/- was awarded to the 5th respondent. Ext.R5(1)3 dated 14.12.2004 issued by the Executive Engineer (Civil) certifies that work order for the supply and transportation of river sand for an amount of Rs.65,800/- was awarded to the 5th respondent. Ext.R5(1)4 dated 15.02.2005 issued by the Assistant Engineer (Civil) certifies that the 5th respondent had taken up the construction work of addition and alteration to PWD Division Office and construction of Brick Masonry Rain Water Harvesting Tanks. It also says that he had done brick work masonry pavilion around the football ground. However, this certificate does not indicate the value of the work that he is stated to have executed. R5(1)5 dated 06.08.2005 is another certificate issued by the Executive Engineer (Civil) that the 5th respondent was issued two work orders of the value of Rs.50,069/- and Rs.40,984/-. However, this certificate also does not state anything about the nature of work that was awarded to him by the work orders mentioned. Similarly, Ext.R5(1)6 dated 17.04.2006 is another certificate issued by the Assistant Engineer (PWD) to the effect that

5 work orders were awarded to the 5th respondent during the period 30.08.2005 to 28.12.2005 for the value ranging from Rs.1 lakh to Rs.8,920/-. Ext.R5(1)7 dated 17.05.2006 is a certificate of the Executive Engineer to the effect that the 5th respondent had executed the work mentioned therein. The works that are executed are (1) procurement transportation, handling and supply of building materials for Rs.5,09,000/- supply of river sand for Rs.40,984/-, supply of granite chips for Rs.93,757/-, supply of river sand for Rs.62,659/- and Rs.65,291/- and supply of granite chips for Rs.95,174/-.

11. A reading of these certificates would show that none of the certificates produced by the 5th respondent satisfy the requirements of Ext.P1 tender notice. The works that are awarded to the petitioner are the construction of PWD store building and re-flooring of LPWD Office. In terms of the tender notice the tenderer should have executed the specified number of similar works of the value prescribed therein. True that the expression 'similar works' is not defined in Ext.P1. If words are not defined in the document, the

meaning that has to be assigned is its common parlance meaning. Therefore, to interpret that expression, it may not be appropriate to import the meaning of similar expression that occur in statutes such as Central Excise Act and hence, the judgments relied on by the Learned Senior Counsel were rendered out of context and cannot be relied on.

12. Understood in the common parlance meaning, the term similar work occurring in Ext.P1 can only mean the works similar to what is mentioned in Ext.P1. If that be so, the certificates that are relied on by the 5th respondent and accepted by respondents 1 and 2, does not satisfy the requirements of Ext.P1 tender notice. Necessarily therefore, the 5th respondent has to be held to be ineligible to have been issued the tender documents or awarded any work in pursuance to Ext.P1.

13. It could be because he had realized his weakness in his case that the 5th respondent had vehemently canvassed the theory of public interest and that the petitioner is not an aggrieved person. It is true that in matters of tender where projects executed by the

government are involved, the court should be slow to interfere in the decisions that are taken by the concerned authorities. In this case, it is the specific case of the petitioner that the 5th respondent is a benami of the 4th respondent and it is on that allegation that the 4th respondent has been impleaded in personal capacity as well. However, in view of the denial of these averments by the 4th respondent on oath and as the petitioner has not placed any material in support of his contention, I cannot accept the plea of malafides that are raised against the 4th respondent.

14. It is the settled position of law that once tender conditions are specified, unless the power to relax the said conditions is reserved in the tender notice itself and that such power is exercised for bonafide purposes, the authority is bound to strictly comply with such conditions. It has been held that once the rules of the game are set, the rules cannot be altered at a later point of time. In this case, it is not the case of any one of the respondents that the tender conditions are not set or that there is any power reserved for relaxing the same. However, respondents 1

to 3 in their counter affidavit has stated that in the past also they have relaxed the prescribed experience. Though this averment has been made, they have not placed anything on record in proof of the same. Even otherwise, in view of the legal position that the party inviting tender is bound by the norms that has been prescribed, the fact that such relaxation has been given in the past will not legitimize it if it is otherwise illegal. In the case of W.B. State Electricity Board v. Patel Engineering Co. Ltd and others (2001(2) SCC 451), the Apex Court has held as follows:

> The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored.

This judgment has followed with approval in the apex court judgment in Puravankara Projects Ltd. v. Hotel Venus International (2007(2) KLT 943(SC).

15. Therefore while it is important that the court should interfere with award tender only if public interest justifies the same, it is equally important that the court should scrupulously enforce

compliance with the tender conditions as well.

16. The contention relying on CPWD Manual that there is no provision similar to those included in Ext.P1 is also devoid of merit. So long as Ext.P1is conditional, any tender received in response thereto, has to be complying with those conditions. What remains is the argument that the petitioner is not a person aggrieved to maintain the writ petition. The petitioner had contended that when he asked for the issue of tender documents the same was denied to him on the ground that he did not satisfy the tender condition. This allegation of the petitioner is denied by respondents 1 to 3 and they would contend that even as on the last date specified for issue of tender notice no application has been received from him. In the light of this allegation and its denial, and as the petitioner has not placed on record any documents to sustain his plea, I am not in a position to accept the contention of the learned counsel for the petitioner. But then, the question would still be whether in a case petitioner has not proved himself to be an aggrieved person, the court should refuse to interfere even after a finding that a patent

illegality has been committed and that tender conditions have been violated. In my view such a conservative approach to this issue will be in abdication of the duty that is cast on a court of law exercising power of judicial review. I take this view, for the reason that I am fully satisfied that the 5th respondent did not satisfy the tender conditions. It is despite that, the respondents have chosen him for award of work. In such a situation, I am not willing to dismiss this writ petition solely accepting the contention of the 5th respondent that the petitioner has not proved himself to be an aggrieved person.

17. In the result I allow this writ petition and Exts.P3 and P4 will stand quashed and the respondents 1 to 3 are directed not to release any payment to the 5th respondent in pursuance to Exts.P3 and P4. However, in pursuance to the order dated 13.02.2007 if the 5th respondent has received any payment for the work he has done, such payments will not be recovered from him.

W.P.(C)No. 23067 of 2007

18. In this writ petition relief sought for is against the award

of works at Serial No.6 of Ext.P1 tender notice and serial No.4 of Ext.P2 to the 5th respondent. The petitioner has not produced the tender conditions in support of his plea that the 5th respondent was ineligible to be awarded the works pursuant to Exts.P1 and P2. On the other hand the allegation in this case is that the 4th respondent has issued Ext.P6 Evaluation Certificate manipulating the same so that the respondent obtained a solvency certificate. It is his contention that the value of the properties indicated therein is even more than the value of properties in M.G. Road, Bangalore.

19. The 4th respondent had filed a counter affidavit wherein it is stated that he had issued a certificate on the basis of local reports and in accordance with the standards prescribed by the Central Public Works Department. He has denied the allegation that the property has been wrongly valued.

20. Apart from making the averments in paragraph 8 of the writ petition, petitioner has not placed any document to assume that the valuation certificate issued by the 4th respondent is incorrect. Though the 4th respondent has been impleaded in his

personal capacity and allegations of malafides are also raised, I am not inclined to accept those contentions for want of proof of these allegations. In view of this, I must hold that the petitioner has miserably failed in proving his allegations in so far as W.P.(C) No.23067 of 2007 is concerned. Necessarily therefore this writ petition deserves to be dismissed and I do so.

In the result W.P.(C)No. 32711 of 2006 will stand allowed in the above terms and W.P.(C)No. 23067 of 2007 will stand dismissed without any order as to costs.

ANTONY DOMINIC, JUDGE

Rp